SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1064

ROBERT M. WENDLINGER,

Petitioner,

vs.

HARDWARE MUTUAL CASUALTY COMPANY, A CORPORATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The opinion of the United States Circuit Court of Appeals, Fourth Circuit, has not been officially reported, but may be found in the R. page 54. The opinion of the District Court of the United States for the Eastern District of Virginia, appears on page 49 of the R., and its final judgment on page 50 of the R.

II

Jurisdiction

The jurisdiction of this case is invoked under Section 240-(a) of the Judicial Code, as amended, 28 U. S. C. A., Section 347 (a). The judgment of the United States Cir-

cuit Court of Appeals, Fourth Circuit to be reviewed was entered on the 26th day of December, 1944 (R. 63).

III

Statement of the Case

A statement of the case appears under heading "B" of the petition for writ of certiorari. In the interest of brevity, it is not now repeated, but is referred to with the request that it be considered as herein incorporated by reference.

IV

Question Presented

The question specifically brought forward by the petition for writ of certiorari appears under heading "C" of the petition, and for the sake of brevity is not now repeated but referred to with the request that it be considered as herein incorporated by reference.

V

Argument

Policy Misconstrued

The Circuit Court of Appeals for the Fourth Circuit, violated the well established rule that insurance policies must be construed strictly against the insurer, and in favor of the insured (see *Midwest Dairy Corp.* v. *Ohio Ins. Co.*, 356 Ill. 389; and *Aschenbrenner* v. *U. S. F. & G. Co.* 292 U. S. 80).

And it failed to give any force or effect to the rider attached to the policy denominated "additional interest endorsement". The policy of insurance was a printed standard form containing the usual "exclusion" clause and be-

cause of the fact that the partnership had two pleasure type automobiles, each partner used one for his own purposes (R. 31-32), the "additional interests endorsement" was attached to the policy. This endorsement provided that the insurance be extended to cover operations for pleasure purposes in the following language:

> "* * * Such insurance * * * applies * * * to any other person, or organization as insured, provided: the insurance applies only if the named insured's operations are classified as 'automobile dealer or repair shop', and only with respect to the use, for such business operations *or for pleasure purposes*, italics (*ours*) of any automobile covered under such classification * * * all other conditions and provisions remain unchanged."

The purpose and effect of this endorsement was to change or nullify the "exclusion" provisions of the policy limiting the insurance coverage to operations in connection with the business. In other words, to suit the needs of the parties, the terms of the policy were expressly changed to cover operations "for pleasure purposes of any automobile covered under such classification". No limitation or restriction of any nature whatsoever was placed upon operation of any automobile for pleasure purposes. The Supreme Court of the State of Wisconsin, in which state the policy we are here dealing with was issued, has construed the point at issue in the case of Catherine Culver, respondent vs. T. B. Webb, d/b/a Webb Auto Sales, etc. 12 N. W. (2nd) page 731 (Wisconsin) at 735 and 736.

> "We now come to a question concerning the insurance coverage that presents substantial difficulties. On November 29, 1940, defendant Insurance Company issued to T. B. Webb, d/b/a Webb Auto Sales, what is denominated 'Garage Liability Policy' (National Standard Garage Liability Policy) * * * the insurer agrees to pay all sums which the insured shall

> become obligated to pay by reason of * * * the ownership, maintenance, occupation, or use of the premises herein designated, including the public ways immediately adjoining, for the purpose of an automobile dealer or repair shop, and all operators either on the premises or elsewhere which are necessary and incidental thereto, including repairs of automobiles or their parts, and ordinary repairs of buildings on the premises and the mechanical equipment thereof; and the ownership, maintenance, or use of any automobile for any purpose in connection with the above defined operations and also for pleasure use."

This policy likewise included the exclusion clause that the Circuit Court of Appeals for the Fourth Circuit based its opinion on, that this honorable Court is asked to review, the terms of which clause are identical namely:

> "This policy does not apply * * * to the ownership, maintenance, or use for pleasure purposes of any automobile not owned by or in charge of the named insured, for use principally in such operations."

Continuing, the Court said: at 736,

> "In this case, the Insurance Company, by including a coverage of the owner of the garage for pleasure purposes has introduced into a standard garage policy the essential features of those policies which, under Section 204.30 (3) are required to include the omnibus coverage clause. * * * By assuming to insure Webb against liability arising out of the operation of his car for pleasure, the insurer, to the extent of this obligation has created a 'privately owned car policy' * * * Culver was an additional assured under the policy and within the limits of the policy, he is entitled to coverage as such assured."

Pleasure Purposes

The construction of the phrase "for pleasure purposes" placed by the Circuit Court of Appeals, nullifies and sets at

naught the additional interest endorsement, and renders that endorsement meaningless. To limit as the Circuit Court of Appeals did the term "for pleasure purposes" to operations of the garage creates an anomalous and absurd situation and this is well pointed out in the case of *Georgia Casualty* v. *Waldman*, 53 Federal (2), Page 24 at Page 25:

> "Taking up first the question of use, appellant's contention that the business and the pleasure of the corporation alone is meant, is untenable. The corporation could have no pleasure and applied to the corporation only, that term of the contract would be meaningless. If use in the corporate business alone is meant the broad provision for the protection of all persons who use the automobile with permission would be largely useless and in-operative."

Moreover, the Circuit Court of Appeals for the Fourth Circuit placed a different construction on similar language in a garage liability policy in the case of *Newton* v. *Employers Liability Assurance Corporation*, 107 Federal (2nd) 164.

> "From an examination of the policy and the declarations attached thereto, it is apparent that the policy was intended to cover the ownership or maintenance or use of any automobile for any purpose, usual to the assured's operations in the business of auto sales at 225 No. Allen Street, Albany, New York, including private pleasure use * * * if the evidence * * * establishes that the car * * * was being driven * * * with the permission of Englert (the insured) either upon his business in connection with the Albany Sales Office, *or for private pleasure, the policy covers.*"

If the defendant in this case desired or intended to restrict the use of this automobile for pleasure, it could have and should have so stated in the policy. However, it was evidently not the intention of the parties to so restrict its

use. This is apparent not only from the fact that no such restrictions are stated in the policy, but also from the fact that such limitations of use would not have served the purposes of the parties in that the records shows that a Mr. Duncan and Mr. Barbee were partners, owning two pleasure type automobiles and these partnership cars were included for a flat charge so that the owner of these pleasure type cars would have insurance protection, not only while at or in the garage that they operated, but as any other individual owner of an automobile.

Partnership Not Dissolved

The Circuit Court of Appeals for the Fourth Circuit further erred in treating this case as though the partnership had been dissolved. The partnership had not been dissolved. On the contrary, it continued to function and its status as a partnership was the same at the time the accident occurred as it was when the policy was written, except that one of the partners, Barbee, took employment elsewhere and relinquished his salary from the business while away, but not his share of the profits, so that the relationship between the insurer and the insured as a partnership remained the same.

No Territorial Limitation

The fact that the accident out of which this litigation grows, happened in Virginia rather than in Illinois, the place of residence of the insured, does not destroy the insurance coverage of the car in question, for there is no territorial limitation contained in the policy, but on the contrary it expressly recites that it applies to "accidents which occur during the policy period within the United States of America, Canada, or Newfoundland."

Conclusion

In conclusion, counsel for the petitioner respectfully submit that for the reasons herein set forth, a writ of certiorari should be granted the petitioner, and that this court should review and reverse the decision of the United States Circuit Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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